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# Slavutych v. Baker: Privilege, Confidence and Illegally Obtained Evidence

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# *Slavutych* v. *Baker*: PRIVILEGE, CONFIDENCE AND ILLEGALLY OBTAINED EVIDENCE

By JOSEPH J. ARVAY*

## A. INTRODUCTION

The decision of the Supreme Court of Canada in *Slavutych* v. *Baker*[1] is of considerable importance to students of the law of evidence. The decision represents a significant contribution to our interpretation of the doctrines of confidence and of privilege, and raises several issues which merit further analysis. These issues include the use of the equitable doctrine of confidence as a rule of evidence, and the implications of such usage with respect to the establishment of an illegally obtained evidence rule in civil proceedings. The case also illustrates the need to maintain a clear distinction between the doctrines of confidence and of privilege. The judgment of the Court of Appeal raises the question of whether the tort doctrine of qualified privilege is an available defence to a person in Professor Slavutych's position.

The University of Alberta, in considering whether or not to grant tenure to a Professor X, sent a form to Professor Slavutych asking him to state frankly his opinion of the advisability of granting tenure to Professor X. Professor Slavutych was repeatedly assured that his report would remain strictly confidential and indeed that it would be destroyed as soon as the tenure committee had met. As it happened, Professor Slavutych did not hold Professor X in high esteem and he provided the University with a candid but scathing report. The report read as follows:

> He was highly dishonest, often unethical.
> He favoured certain students by giving them high marks — so that they might praise him before the administrators.
> While teaching Ukrainian, he did not pursue his speaking ability in this language. On the contrary, he has declined since he uses English almost exclusively, in his senior Ukrainian courses.
> He participated in intrigues and the smearing, invented by his former Head. However, he did not hesitate to plunge a long knife in his former chairman's back after the latter was relieved from his duties.
> Being almost 40 years old and not having published anything, he has proved that he is definitely not a scholarly type of person.
> In spite of these comments, I would comply with any decision of the Tenure Committee.[2]

The University was not impressed by Professor Slavutych's frank response. In fact the President of the University regarded Professor Slavutych's report a serious act of misconduct because he "made a very serious charge

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[1] [1976] 1 S.C.R. 254; 55 D.L.R. (3d) 224 (S.C.C.). All subsequent references will be to the report in the Dominion Law Reports.

[2] *Id.* at 226.

on the flimsiest basis and . . . advanced no satisfactory evidence to prove that the charge . . . made was true."[3]

Ironically, Professor X was granted tenure, but the University instituted procedures to dismiss Professor Slavutych because of his report.[4] The matter was eventually referred to an arbitration board which agreed that the University had good and sufficient cause to dismiss Professor Slavutych.[5] The Alberta Supreme Court, Appellate Division, affirmed the decision of the arbitration board, albeit for quite different reasons.[6] However, the Supreme Court of Canada allowed the appeal and quashed the board's decision. Spence J. held that the report was not admissible as evidence in the arbitration proceeding and that no charge could be based on that report.[7]

Spence J., speaking for an unanimous court, based his decision on two alternate grounds. In what might be regarded as *obiter dicta*, he considered the evidentiary doctrine of privilege to be applicable. However, the decision relied primarily on the equitable doctrine of confidence.

## B. APPLICATION OF THE DOCTRINE OF CONFIDENCE

The Court's use of the doctrine of confidence was similar to the use of an exclusionary rule of evidence. The decision of the arbitration board was quashed because the board had improperly admitted the confidential report into evidence.[8] The board was not allowed to make use of the confidential

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[3] *Id.* at 227, quoting directly from the letter sent by the President of the University to Professor Slavutych.

[4] The University laid four charges against Professor Slavutych in support of their allegation that there was good and sufficient cause for dismissal. Two of the charges were not sufficiently established before the arbitration board and one charge, though proven, was not considered sufficient to warrant dismissal. Hence the only charge of concern in this article is that based on the confidential report.

[5] The procedure followed in instituting a dismissal action is outlined in *The Universities Act*, R.S.A. 1970, c. 378, s. 19(3), and in article 122 of *The University of Alberta Handbook* (1968). The arbitration board, although without any legal authority to do so, recommended some lesser penalty.

[6] *Re Slavutych and Board of Governors of the University of Alberta* (1974), 41 D.L.R. (3d) 71.

[7] *Supra*, note 1 at 229.

[8] *The Arbitration Act*, R.S.A. 1970, c. 21, s. 11(2):

> Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set aside the award.

In the Appellate Division of the Alberta Supreme Court, Sinclair J.A. stated:

> As will be seen in *Russell on Arbitration*, 18th ed. (1970), p. 235, where evidence which goes to the root of the question has been wrongfully admitted, arbitrators are guilty of legal misconduct. Although s. 122.8 of the [faculty] handbook provides that the arbitration board shall determine the procedure to be followed and is not bound by the laws of evidence or the procedures of the Court, I believe the principle stated by Russell is applicable to the proceedings before us. *Supra*, note 6 at 76.

Although the Supreme Court of Canada did not explicitly deal with this point, it must be assumed that it was tacitly adopted. It may be that because the Supreme Court of Canada did not address itself to the issue of whether the rules of evidence are applicable in administrative proceedings, evidence of this type of communication will always be inadmissible, whether or not the traditional rules of evidence apply. In future judicial proceedings however, I have no doubt as to the inadmissibility of the evidence.

communication in arriving at its decision. Spence J. adopted the principle articulated by Sinclair J.A. in the court below:

> I believe the equitable principle of breach of confidence has a role to play in the present appeal. It seems to me that when tenure procedure with respect to a candidate is initiated there comes into existence, within the University of Alberta, something which I will call, for want of a better term, an umbrella of confidence. The protection afforded by this umbrella extends to all within the institution who have a legitimate interest in the tenure proceedings. The nature of that shelter is such that confidential communications, made in good faith, ought not to be used to the prejudice of their maker as a member of the university community. That being so, had the tenure form sheet been submitted by the appellant in good faith, it should not have been used as part of his dismissal proceedings.[9]

The doctrine of confidence has never been used, however, to quash a judicial decision simply because it was based on confidential information. The traditional use of the doctrine of confidence has been to restrain a person from breaching a confidence in an out-of-court situation. Thus, the courts have enjoined the publication in a newspaper of confidential documents or communications,[10] or have awarded damages when a defendant made improper use of trade secrets.[11] Furthermore the courts have held that a remedy for breach of confidence is available not only against a party to the confidence but also against other persons into whose possession that information has come.[12]

In this context the courts have been most solicitous of the individual's right to confidentiality. Disclosure of the confidence will only be allowed where the defendant can prove that its revelation is in the public interest.[13]

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[9] *Supra*, note 1 at 231. Spence J. at 230 also approved the oft-quoted passage of Roxburgh J. in *Terrapin Ltd.* v. *Builders Supply Co. (Hayes) Ltd.*, [1960] R.P.C. 128 at 130:

> As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

[10] *Argyll* v. *Argyll*, [1967] Ch. 302; *Distillers Co. Ltd.* v. *Times Newspapers Ltd.*, [1975] 1 All E.R. 41 (Q.B.D.).

[11] *Seager* v. *Copydex Ltd.*, [1967] 2 All E.R. 415. See generally 21 *Halsbury's Laws* (3rd ed.) 395, para. 825. Also, see P. M. North, *Breach of Confidence: Is There a New Tort?* (1972), 12 J.S.P.T.L. 149; P. Burns, *The Law and Privacy: The Canadian Experience* (1976), 54 Can. Bar Rev. 1.

[12] *Argyll* v. *Argyll, supra*, note 10 at 333. See also *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 25; 41 E.R. 1171; *Distillers Co. Ltd.* v. *Times Newspapers Ltd., supra*, note 10; *Fraser* v. *Evans*, [1969] 1 All E.R. 8 at 11 *per* Lord Denning:

> No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking the confidence.

[13] In *Fraser* v. *Evans, id.* at 11, Lord Denning M.R. stated: "There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."

But a heavy onus lies on the defendant. In *Beloff* v. *Pressdram Ltd.*[14] the court suggested that disclosure would be justified in the public interest for

> . . . matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public.[15]

It may be that when the plaintiff is the government, a different rule applies and requires the plaintiff to prove that the public interest requires that the confidence be maintained.[16] The governmental obsession with secrecy has prompted the judiciary to defer to the public's right to know,[17] and thus the distinction between the public and private plaintiff comes as no surprise.

However, when one of the parties attempts to invoke the doctrine of confidence to exclude relevant evidence in a judicial proceeding, the court's attitude has been very different. In *Argyll* v. *Argyll,*[18] the English Court of Appeal clearly distinguished the equitable and evidentiary uses of the doctrine of confidence. Ungoed-Thomas J. implicitly approved the argument of counsel who stated:

> The fact that statements can be given in evidence which are in breach of confidence does not mean that they can be repeated or published otherwise in the course of evidence in judicial proceedings.[19]

This distinction can be traced back to a very old tenet of the law of evidence which is best stated by Wigmore: "No pledge of privacy nor oath of secrecy can avail against a demand for truth in a court of justice."[20] The fact that a communication was made in confidence does not render it a privileged communication and thus protected from disclosure in court.[21] A statement in a judgment by Rand J. is apposite:

> [The privilege against disclosure] requires as its essential condition that there be a

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[14] [1973]1 All E.R. 241. See also *Initial Services Ltd.* v. *Putterill,* [1967] 3 All E.R. 145.

[15] *Id.* at 260.

[16] In *Attorney-General* v. *Jonathan Cape Ltd.,* [1976] Q.B. 752 at 770, Lord Widgery C.J. stated:

> The Attorney-General must show (a) that such publication would be in breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied on.

See also M. W. Bryan, *The Crossman Diaries — Developments in the Law of Breach of Confidence* (1976), 92 Law Q. Rev. 180.

[17] This attitude is most apparent with respect to claims of Executive Privilege. See *Conway* v. *Rimmer,* [1968] A.C. 910; *Rogers* v. *Secretary of State for the Home Department,* [1972] 3 W.L.R. 279. A recent unreported decision of the Ontario High Court requiring the disclosure of a draft policy proposal from a Cabinet Minister to the Cabinet is of great interest. See *Rudnicki* v. *C.M.H.C.,* July 26, 1976. In the United States there is of course the landmark decision of *U.S.* v. *Nixon,* 418 U.S. 683; 41 L. Ed. 2d 1039; 94 S. Ct. 3090 (1974).

[18] *Supra,* note 10.

[19] *Id.* at 313.

[20] Wigmore, *Evidence in Trials at Common Law,* Vol. 8, rev. J. McNaughten (Boston: Little, Brown, 1961) §2286 at 528 [hereinafter Wigmore].

[21] See, for example, *Wheeler* v. *LeMarchant* (1881), 17 Ch. 675; *Rex* v. *Thomas* (1836), 7 Car. & P. 345; 173 E.R. 154; *Rex* v. *Shaw* (1834), 6 Car. & P. 372; 172 E.R. 1282.

> public interest recognized as overriding the general principle that in a court of Justice every person and every fact must be available to the execution of its supreme functions.[22]

Lord Denning M.R. has attempted to alter this common law rule. He has advocated that the word privilege be discarded because "it is misleading" in that "[i]t distracts the mind from the true question which is whether the court will compel a person to break a confidence."[23] At one point he suggested that a claim of confidence alone would suffice to protect a document from disclosure in court.[24] This argument was rejected by the House of Lords,[25] but he has now put forward an alternate proposal:

> When information has been imparted in confidence, and particularly where there is a pledge to keep it confidential, the courts should respect that confidence. They should in no way compel a breach of it, save where the public interest clearly demands it, and then only to the extent that the public interest requires.[26]

But even this compromise was rejected by his brethren in the Court of Appeal. Sir John Pennycuick's interpretation of the law is more likely to be accepted by the courts. He said:

> The law, as I understand it, is not that a confidential document is immune from discovery unless the public interest requires its disclosure; but that all relevant documents, whether or not confidential, are subject to disclosure unless on some recognized ground, including the public interest, they are withdrawn from disclosure.[27]

This formulation is consistent with recent *dicta* by the English courts that the trial judge has a discretion to exclude from evidence non-privileged communications where public policy demands.[28] Although one Canadian court[29] has seen fit to exercise this discretion, it may be that in Canada a trial judge has no discretion to exclude highly probative evidence.[30] But whether

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[22] *Regina* v. *Snider*, [1954] 4 D.L.R. 483 at 486.

[23] *D.* v. *National Society for the Prevention of Cruelty to Children*, [1976] 2 All E.R. 993.

[24] *Alfred Crompton Amusement Machines Ltd.* v. *Commissioners of Custom and Excise* (No. 2), [1973] 2 All E.R. 1169 at 1180 *per* Lord Cross: "It is clear that in general a party cannot object to produce a document not covered by legal professional privilege because the information contained in it was imparted to him in confidence." However, there has been some *dicta* to the effect that confidentiality may be a factor in assessing a claim of Crown Privilege. In *Alfred Crompton* Lord Cross stated at 1184: " 'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."

Similarly in *Re Blais and Andras* (1972), 30 D.L.R. (3d) 287, Thurlow J. of the Federal Court of Appeal stated: ". . . whenever confidential information or its sources are likely to be endangered by production it is open to the Minister to claim privilege in respect of the contents of the particular document on that basis."

[26] *Supra*, note 23 at 999.

[27] *Id.* at 1009.

[28] *Attorney-General* v. *Mulholland*, [1963] 1 All E.R. 767; *Attorney-General* v. *Clough*, [1963] 1 All E.R. 420.

[29] *Carter* v. *Carter* (1975), 53 D.L.R. (3d) 491.

[30] *Regina* v. *Wray*, [1971] S.C.R. 272. Some commentators have suggested that the discussion of discretion in *Wray* cannot be considered apart from the question of illegally obtained evidence about which that case was primarily concerned. See S. I. Bushnell, *The Confession Rule: Its Rationale (A Survey)* (1973), 12 W. Ont. L. Rev. 47 at 63.

or not this is true, the courts in Canada and England have never protected a communication from disclosure in court solely on the basis that it was made in confidence.[31] The common law has consistently regarded the public interest in the administration of justice, whether criminal[32] or civil,[33] as paramount to any interest in confidentiality *per se*.

The application of the doctrine of confidence in *Slavutych* v. *Baker* must be viewed in the context of this jurisprudence. The communication was held to have been improperly admitted as evidence, but the Court did not arrive at this conclusion solely on the basis of its confidentiality. The case turns on the fact that the party seeking to compel disclosure was the very party who had pledged that it would remain confidential. To borrow a phrase from Lord Denning, it was based on "the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."[34]

Had this case involved an action by Professor X against the University in which Professor X sought production of this document, there is no doubt that the court would have compelled the disclosure even though it would result in revealing the confidence between Professor Slavutych and the University.[35] The Supreme Court of Canada's approval of a New Zealand Supreme Court decision is instructive in this regard. In *Bell* v. *University of Auckland*[36] a litigant was attempting to compel disclosure of a communication which he had pledged would remain confidential; hence the case was

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[31] There is some suggestion in *Butler* v. *Board of Trade*, [1971] Ch. 680 that this was the basis of the decision in *Ashburton* v. *Pape*, [1913] 2 Ch. 469, but that this principle was different in civil and criminal proceedings. The validity of this analysis of the *Pape* decision is debatable. See text at note 46, *infra*. Furthermore, the law has never distinguished between civil and criminal trials for the purpose of protecting a breach of confidence *per se*.

[32] For example, *Butler* v. *Board of Trade*, *id.*, and *Rumping* v. *D.P.P.*, [1964] A.C. 814.

[33] The most recent example is *D.* v. *N.S.P.C.C.*, *supra*, note 23. In Canada see, *Cuthbertson* v. *Cuthbertson*, [1951] O.W.N. 845. The public interest in the administration of justice was relied on to protect a confidence from disclosure in a newspaper in *Distillers Co. Ltd.* v. *Times Newspapers Ltd.*, *supra*, note 10. In that case disclosure would have threatened the integrity of the discovery process since the plaintiff's documents that the defendants had planned to publish had been obtained on discovery by litigants in a separate suit against the plaintiff. It was held in the public interest that documents disclosed on discovery should not be permitted to be put to an improper use.

[34] *Hubbard* v. *Vosper*, [1972] 1 All E.R. 1023 at 1028-29.

[35] This conclusion would follow but for the first part of the decision in *Slavutych* v. *Baker*. The Supreme Court held that the communication between Professor Slavutych and the University was privileged. If this were true then the communication would be protected from disclosure not only by a party to the communication but also by any third party. However, it may be argued that the Court erred in holding this communication privileged and that disclosure at the behest of Professor X should thus be compelled. Even if *Slavutych* was an appropriate case for the application of privilege, the proposition made is nevertheless accurate. It would not help Professor X, but would be of assistance to any other third party with respect to a non-privileged but confidential communication.

[36] [1969] N.Z.L.R. 1029.

analogous to *Slavutych* v. *Baker*.[37] The New Zealand Supreme Court refused to compel disclosure; however, it was not prepared to extend this protection[38] any further:

> . . . [where] A. and B. having solemnly agreed together that their communications shall be secret, find that those communications are relevant to a claim by or against C., [then C.] of course cannot be bound by any pledge that may have passed between the first two of them. It is understandable enough that in such a case C. may successfully contend that the Court has a right to hear the truth, notwithstanding any private arrangement, however solemn, made between A. and B.[39]

Although the doctrine of confidence would protect a confidential communication from disclosure in an out-of-court situation even against a third party, its application in an evidentiary context is and ought to be limited. A third party who demands the production of a non-privileged but confidential communication that is in the possession of the parties to that communication is entitled to that disclosure when the communication constitutes relevant evidence in pending litigation. Indeed, if the third party has properly come by that evidence he ought to be able to adduce it as evidence notwithstanding that its disclosure will breach the confidence relied on by two or more other individuals. To rule otherwise would be to render a communication privileged solely because it was made in confidence. The trial must retain as its primary objective the ascertainment of truth in the absence of some more compelling public interest. The mere fact of a breach of confidence should not be given preeminence.

*Slavutych* v. *Baker* may, however, constitute a significant step in the development of a rule on illegally obtained evidence for civil proceedings. At present the courts will admit relevant evidence irrespective of the manner in which it was obtained.[40] This principle is equally applicable in civil and criminal proceedings.[41] The rationale for this rule has been succinctly stated:

> The basis for judicial disinterest in the means by which evidence is secured in relation to its admissibility appears to be two-fold: (1) The court, in attempting to resolve the issues before it, should hear all relevant and probative evidence relating thereto and the fact that illegal practices have taken place in procuring the evidence has no bearing on these questions and should not distract the court from its primary task; (2) A party who has been victimized by the illegal acts of another still has available to him the right to initiate criminal and civil proceedings against the wrongdoer and that, rather than excluding the evidence, is a more appropriate way of dealing with the offender.[42]

This comment will not attempt to explore all the ramifications of this

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[37] In fact Spence J., *supra*, note 1 at 230 stated: ". . . some of the circumstances bear a marked resemblance to the present case."

[38] Unfortunately the New Zealand Supreme Court incorrectly characterized this problem of confidence as a problem of privilege. The Supreme Court of Canada compounded the confusion by citing *Bell* as authority for the doctrine of confidence. Hence we have here the rare situation when two wrongs do make a right.

[39] *Supra*, note 36 at 1036.

[40] *Regina* v. *Wray*, *supra*, note 30; *Calgraft* v. *Guest*, [1898] 1 Q.B. 759.

[41] *Kuruma* v. *The Queen*, [1955] A.C. 197 at 204 *per* Lord Goddard.

[42] J. Sopinka and S. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 336.

controversial rule of evidence.[43] But, whatever merits the Canadian position may have with respect to criminal proceedings, "the present rule, . . . deserves reconsideration in its application to civil case."[44] A private litigant who has obtained evidence illegally should not be able to demand its admission by relying on the public interest in the accurate resolution of a litigious dispute. Such an argument would be a cheap masquerade of his private interests and the law ought not condone such improprieties to further those private interests.

In *Slavutych* v. *Baker* a rule of exclusion was applied when the party who sought to use the evidence was the very party who pledged that it would remain confidential. One could argue that the court's concern with breach of confidence is simply reflective of its overriding concern with equity and fairness. Where it is inequitable to rely on evidence then it ought to be inadmissible, whether the inequity arises from a breach of confidence or from the impropriety of its acquisition. The court, however, may refuse to exercise its equitable discretion when the party in possession of the illegally obtained evidence was not involved or responsible for the interception of that evidence.[45]

Even if the decision is not to be taken to its rational conclusion, nevertheless if it is read in conjunction with the decision of *Ashburton* v. *Pape*,[46] there emerges a limited illegally obtained evidence rule. In the *Pape* decision the plaintiff was granted an injunction to restrain the defendant from disclosing in *future* bankruptcy proceedings copies of letters written by the plaintiff to his solicitor. The defendant improperly obtained the copies from the solicitor's clerk. The English Court of Appeal was visibly perplexed.[47] On the one hand the equitable doctrine of confidence would traditionally protect such a communication had its disclosure been threatened in an out-of-court situation.[48] But on the other hand the rule in *Calgraft* v. *Guest*[49] dictated that

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[43] For a brief analysis and a lengthy bibliography on this subject see (Can.) Law Reform Commission, *Evidence, Study Paper 10, The Exclusion of Illegally Obtained Evidence* (Ottawa: Information Canada, 1974).

[44] *Supra,* note 42 at 343. At least in a criminal proceeding there is the additional factor of the public interest in apprehending and convicting the guilty.

[45] The Ontario Law Reform Commission also recommends that a trial judge have the discretion to reject illegally obtained evidence in proper cases. Section 27 of the Draft Bill for a new Evidence Act reads as follows:

> In a proceeding where it is shown that anything tendered in evidence was obtained by illegal means, the court, after considering the nature of the illegality and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence if the court is of the opinion that because of the nature of the illegal means by which it was obtained its admission would be unfair to the party against whom it is tendered.

(Ont.) Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney-General, 1976) at 258.

[46] *Supra,* note 31.

[47] Cozens-Hardy M.R. stated *id.* at 471 that it was "a curious case." Kennedy L.J. said at 473, "It is a peculiar case."

[48] The court cited *Tipping* v. *Clarke*, 2 Hare 383; 67 E.R. 157; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Morison* v. *Moat*, 9 Hare 241; 68 E.R. 492.

[49] *Supra,* note 40.

relevant evidence would be admissible regardless of the manner in which it was obtained, and it did not matter that the evidence was a privileged communication or a copy thereof so long as it was now in the possession of the party wishing to disclose it. A confidence was only protected in court when it was a privileged communication which was still in the possession of the parties to the communication.

In granting the injunction, the English Court of Appeal may have avoided a conflict between these two principles. It stipulated that had no injunction been sought, the evidence would have been admissible at the trial,[50] which therefore preserved the rule in *Calgraft* v. *Guest*. Moreover, because the confidence that was protected was really a privileged communication, its preclusion as evidence would not be an assertion of the paramountcy of confidence *simpliciter* over the public interest in the accurate resolution of disputes. The public interest in preserving the solicitor-client relationship was well recognized.[51]

However, it is apparent from this judgment that the court was more concerned with preventing a breach of confidence than a breach of privilege. The authorities that the court relied on in excluding the evidence deal only with the equitable doctrine of confidence and not the evidentiary doctrine of privilege.[52] Why then was the value "confidence" elevated above the value "truth"? It is absurd to distinguish this case on the ground that it involved a pre-trial motion for injunctive relief. Whether this evidence is excluded before trial or at trial does not render its exclusion any less obstructive of

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[50] Kennedy L.J. explained the anomalous result, *supra,* note 31 at 474.

> . . . if, before the occasion of the trial when a copy may be used, although a copy improperly obtained, the owner of the original can successfully promote proceedings against the person who has improperly obtained the copy to stop his using it, the owner is none the less entitled to protection, because, if the question has arisen in the course of a trial before such proceedings, the holder of the copy would not have been prevented from using it on account of the illegitimacy of its origin.

[51] *Ashburton* v. *Pape, supra,* note 31. A comment by Cozens-Hardy M.R. suggests that the Court's result was premised on the fact that the disclosure would involve a breach of a privileged communication. At 473, the learned judge said: "But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged."

[52] *Ashburton* v. *Pape, supra,* note 31. Swinfen-Eady L.J. stated at 475: "The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged."

He went on to distinguish the concepts of privilege and confidence and their respective role in this appeal. At 476-77 he stated:

> There is here a confusion between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has such secondary evidence in his possession. The cases are entirely separate and distinct. . . . The fact . . . that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied.

the litigation process. It is more probable that the decision involved a weighing and balancing of vital interests. On the one hand was the public interest in ascertaining the truth at a civil trial. That was not to be lightly discarded. A mere breach of confidence would not offset that value especially when the party demanding disclosure did not himself pledge the confidence. Nor did the law recognize an impropriety in the acquisition of the evidence as being sufficient to compel its exclusion. But it may be that these two factors considered together were adequate to tip the scales of justice in favour of non-disclosure.

The decision of *Slavutych* v. *Baker* has established that the doctrine of confidence may be asserted at trial. It no longer is illogically restricted to pretrial motions for injunctive relief. The Court implicitly recognized that the public interest in the accurate resolution of disputes is not the sole value in the litigation process. It recognized that confidentiality can be given paramount importance when combined with other factors, in this case the betrayal of Professor Slavutych by the University.

Today the courts can rely on both *Slavutych* and *Pape* to render inadadmissible a *bona fide* confidential communication when its disclosure is sought at a civil trial either by the party who pledged that it would remain confidential or by a party, not privy to the confidence, who has obtained the communication by improper or illegal means.[53]

## C. APPLICATION OF THE DOCTRINE OF PRIVILEGE

In what may be considered as *obiter dicta*,[54] Spence J. held that the communication could also be protected from disclosure on the basis that it was privileged. In so holding, Spence J. did not purport to equate privilege and confidence. Nevertheless, it is arguable that Spence J. tended to blur the distinction between these two concepts, and that the doctrine of privilege was not properly applicable to this case.

In holding that the communication by Professor Slavutych was privileged, the Supreme Court of Canada created a new common law privilege.

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[53] This would seem to be in accord with the view of Sir John Pennycuick, *supra*, note 27 and the accompanying text. The public interest in preserving an individual's right to confidentiality and in ensuring respect for the administration of justice should suffice to render inadmissible illegally obtained confidential documents. This principle should apply *a fortiori* to privileged communications or secondary evidence thereof that has been intercepted by a third party.

[54] Spence J. disagreed with Sinclair J.A. with respect to the application of the doctrine of privilege. Unlike Sinclair J.A., Spence J. regarded the doctrine of privilege as appropriate. However, he then made the rather curious statement that "this is not to be considered as a matter of the application of the doctrine of privilege" and proceeded to discuss the doctrine of confidence. *Supra*, note 1 at 229. It is arguable that the Court's comments with respect to privilege are not *obiter*, but form part of the *ratio decidendi*. In *London Jewellers Ltd.* v. *Attenborough*, [1934] 2 K.B. 206 at 222, Greer L.J. stated:

> . . . two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of judgment.

The confidential communication between a faculty member and the University administration was treated in the same way as the confidential communication between a solicitor and his client.[55] This was most unfortunate. The conferral of privileged status on any communication constitutes an obstruction in the search for truth; the circumstances under which privilege may be found to exist should be limited if our adversary process is to retain its cathartic function in the resolution of societal disputes. A communication ought to be regarded as privileged, and thus protected from disclosure in court, only when the public interest in the preservation of a particular confidential relationship is paramount to the public interest in the administration of justice. It is the preservation of the relationship that is the *raison d'être* of a privilege.[56]

In *Slavutych* v. *Baker*, the Supreme Court relied on a four-fold test enunciated by Wigmore to justify the establishment of a privilege:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[57]

The first two conditions were clearly applicable to the situation in *Slavutych.* The communication was made in confidence and this confidentiality was essential if the faculty member was to be able to make such a communication to the University. Spence J. recognized that it would be impossible for a professor to give the University a candid opinion of his colleagues unless the confidentiality of his report was assured.[58]

It is difficult, however, to accept the Court's conclusion that the latter

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[55] See *U.S.A.* v. *Mammoth Oil Co.* (1925), 56 O.L.R. 635 (C.A.).

[56] See Wigmore, *supra,* note 20 at § 2290.

[57] *Supra,* note 1 at 228. Note that there had been one other occasion in which this test was cited, but it was by a Saskatchewan Police Magistrate in *Re Kryschuk and Zulynik* (1958), 14 D.L.R. (2d) 676.

This test was also cited in the Irish case of *Cook* v. *Carroll,* [1945] I.R. 515. It is also interesting that the Canada Law Reform Commission enunciated a rule with respect to recognizing a privilege for professional relationships which is functionally similar to Wigmore's test:

> A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice.

(Can.) Law Reform Commission, *Report on Evidence* (Ottawa: Information Canada, 1975) at 30-31.

[58] *Supra,* note 1 at 229.

two conditions were also applicable. The relation between the University's administrators and its faculty may be important, but it does not seem to be significantly more important than a multitude of other employer-employee relationships. The common law has never recognized as privileged the communications arising from a master-servant relationship.[59] In fact Spence J. did not explicitly espouse the importance of this relationship. Instead he rephrased the third condition so that it referred to the relation between faculty members. Further, he narrowed the definition of the relevant community to the University community itself whose opinion, one could argue, would be too self-interested to be of any real value. Spence stated:

> As to the third condition, surely it is in the interest of the *university* community that the *relationship between colleagues* must be fostered and that proper procedures for granting tenure to members of the university staff must be furthered.[60] (emphasis added)

Surely the relation to which Wigmore refers must be the relation between the persons who are privy to the communication and not the relation between the party who made it and others who might come to hear of it, were it not privileged. Indeed this concern about harmony amongst colleagues was already implicitly taken into consideration with the second condition. Its incorporation into the third condition is not only redundant but improper.

The fourth condition is essentially an amalgam of the first three and poses some difficulty in its application. What "injury" does Wigmore refer to? Is it the injury that would result to the relationship of the present parties now involved in the litigation,[61] or the injury that would result to all future individuals who find themselves in that relationship? Spence J. did not state his view but it seems fairly obvious that he must have preferred the latter alternative. In this case the injury to the relationship had occurred long before the disclosure of the communication to the arbitration board. The injury occurred as soon as the communication was made. Hence Spence J. must have been concerned about the deleterious effect of disclosure, in similar circumstances, on other faculty-university relationships.

In the situation presented by *Slavutych,* would disclosure deter faculty members from speaking candidly to the University management and thus

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[59] See, for example, *Gentry* v. *Dyment,* [1935] O.W.N. 92. Wigmore suggests that the reason the communications between priest and penitent are not privileged probably lies in a "tacit denial of the third condition." *Supra,* note 20 § 2285 at 528. If that is true can it be said that the relationship between the University administration and its faculty is any more important?

However, the provinces of Quebec and Newfoundland have legislated to make privileged the communications between a clergyman and his parishioners. See, *Quebec Civil Code,* 1965, Vol. 2, s. 308; *The Newfoundland Evidence Act,* R.S.N. 1970, c. 115, s. 6. It seems that in Ireland there is a common law privilege respecting the communications between a priest and penitent. See, *Cook* v. *Carroll, supra,* note 57.

[60] *Supra,* note 1 at 229.

[61] If this interpretation was correct, it would explain why there is a statutory privilege respecting marital communications. Forcing a spouse to reveal a marital confidence might create discord between a husband and wife. However, Wigmore, *supra,* note 20 § 2285 at 528, states that with respect to the marital privilege, "the first three conditions are again clearly present, with only the fourth in any doubt."

injure the relationship? If the communications are not privileged from disclosure, then disclosure may have an injurious effect on the faculty-administration relationship. However, that injury must be balanced against the benefit gained from the disclosure, which of course depends upon the nature of the communication as well as the particular cause of action in which disclosure is sought. Presumably the contents of the communication in the present case constituted sufficient grounds for dismissal. This must have been the Court's initial premise for otherwise there would be no concern over its exclusion.

Hence if disclosure would result in the dismissal of an undesirable faculty member then the court would have correctly disposed of the litigation. The injury resulting from disclosure would be that in future, faculty members would be less likely to make unsubstantiated charges against fellow faculty members. This "injury" will be of little concern to the court and clearly subordinate to the benefit obtained by disclosure. Although it is possible that disclosure of the communication in the present case might deter future faculty members from making even a *bona fide* communication to the University administration, the elevation of this relationship above the public interest in the administration of justice is unwarranted. Wigmore's formula attempts to explain why certain communications were privileged at common law and why others were not. If the third and fourth condition could not be satisfied with respect to the relationships of doctor-patient[62] or journalist-informant,[63] how can it be said that these conditions are satisfied with respect to the university-faculty relationship?

This is not to suggest that Professor Slavutych is without a remedy. His remedy lies in the equitable doctrine of confidence. But breach of confidence is an irrelevant consideration in the application of the fourth condition. Nevertheless it seems to pervade the Court's analysis. Spence J. stated:

> As to the fourth condition, all of the elements that I have just recited stress the desirability of the preservation of the *confidential* nature of the communication. There is, of course, an interest in the operation of the proper procedures for dismissal and it might be said, although I do not think it can be properly said, that such interest would justify the *breach of the confidentiality* of the communication but I do not think that it can be said that this latter interest is any greater than the interest in retention of its *confidentiality* and if the two interests were of equal weight surely the greater effect should be to support the *confidentiality* of a document given upon the firm agreement of both parties that it should remain *confidential*, indeed that it should be destroyed so soon as it had been read and perused, especially when the party who proposes the *breach of that confidentiality*, i.e., the University of Alberta, is the party who made the firm commitment that the *confidentiality* should be absolute.[64] (emphasis added)

If one were to delete from that paragraph any mention of "confidence," one would be left with no cogent reason for the application of the fourth

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[62] *Duchess of Kingston's Case* (1776), 20 St. Tr. 355. But see comments on *Dembie* v. *Dembie* (unreported) in A. M. Kirkpatrick, *Privileged Communication in the Correction Services* (1964), 7 Crim. L.Q. 305 at 316.

[63] *Arnold* v. *The King Emperor* (1914), 30 T.L.R. 462. The occasional *dicta* to the contrary, and indeed the privilege with respect to discovery, is ably discussed in Sopinka and Lederman, *supra*, note 42 at 211-16.

[64] *Supra*, note 1 at 229.

condition. The element of confidence requisite for the recognition of a privilege is considered in the first and second conditions of Wigmore's test. It does not merit such attention in the fourth condition.

Hence it would appear that the doctrine of privilege was improperly applied in *Slavutych* v. *Baker*. It is an irresistable conclusion that the Court's error lay in a conceptual confusion between the doctrine of privilege and the doctrine of confidence.[65] The Court would do well to heed the words of Laskin J.A., as he then was:

> Clarity and consistency in the use of terms of art are desirable in all branches of the law and highly so in the law of evidence.[66]

## D. APPLICATION OF THE DOCTRINE OF QUALIFIED PRIVILEGE

Those who regard the court's extension of an equitable doctrine unsettling and its application of privilege disturbing, would probably have treated this case as being analogous to a defamation suit. In a libel action, a defendant can plead as a defence that his remarks were made on an occasion of qualified privilege. The use of the word "privilege" may create confusion; this is not an evidentiary privilege but a substantive defence to a defamation suit. The defence of qualified privilege is clearly recognized when a person makes a statement in reply to certain confidential inquiries. As the learned author of *Gatley on Libel and Slander* states:

> The mere fact that an inquiry is made about the character or position of another does not necessarily render the answer privileged. "It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions." But where a person who is asked a question touching the character, financial position, or responsibility of another, bona fide believes that his inquirer is asking the question, not to gratify idle curiosity, but for some other purpose in which he has a legitimate interest of his own, it is not merely his right but his *duty* to answer, and if he does so in the honest belief that his answer is true and without any malice towards the person whose character or position is the subject-matter of the inquiry, his answer is a privileged communication.[67]

It is true that this was not an action for libel. However, had Professor X sued Professor Slavutych for writing what he did, then surely Professor Slavutych would have been able to plead the defence of qualified privilege. Why then could not Professor Slavutych assert the same defence in a dismissal action by the University for saying the same thing? Counsel for Pro-

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[65] It is of interest that Spence J. held not only that the document was inadmissible, but also that no charge could be based upon it. *Supra,* note 1 at 229 and 233. This is consistent with the recent opinion that where a communication is privileged, the assertion of that privilege need not await the litigation in which it is relevant. In *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 55 D.L.R. (3d) 713, Thurlow J. at 723 stated that "the right to have the communication protected must also arise at [the time the communication is made] and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law." See also, *Re Presswood and International Chemalloy Corp.* (1975), 11 O.R. (2d) 164.

[66] *Regina* v. *Sunbeam Corp. Ltd.* (1967), 62 D.L.R. (2d) 75 *per* Laskin J.A. at 100.

[67] Gatley, *Libel and Slander,* rev. R. McEwen and P. Lewis (7th ed. London: Sweet & Maxwell, 1974) at 191. Footnotes omitted.

fessor Slavutych made this very argument.[68] The Alberta Court of Appeal rejected this contention without discussing its merits or demerits. Sinclair J.A. simply stated:

> As we are not here dealing with a defamation action I do not believe the principle to be relevant to the present appeal.[69]

But, had the Court considered the policy underlying this defence, it is arguable that the principle was indeed relevant to the appeal. The defence was not created to protect the private interests of any particular defendant but rather to foster an important public interest. Gatley explains it in this way:

> Statements published on an occasion of qualified privilege "are protected for the common convenience and welfare of society." "It was in the public interest that the rule of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest." "In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury."[70]

Indeed one might say that Professor Slavutych has an *a fortiori* case as Professor X's reputation is not directly at issue. Even if it were a relevant factor, surely it would not be deserving of any more consideration in this case than in a libel action by Professor X where the doctrine of qualified privilege would have afforded Professor Slavutych a complete defence.

The Supreme Court did allude to the doctrine of qualified privilege. It did not invoke it to afford Professor Slavutych a defence to the dismissal proceedings, but instead to support the application of the equitable doctrine of confidence. Spence J. adopted Sinclair J.A.'s statement to the effect that the doctrine of confidence can be invoked if the confidential communication was made in good faith.[71] The Alberta Court of Appeal held that the unsubstantiated nature of Professor Slavutych's accusations negated the possibility that Slavutych had acted in good faith. The Supreme Court of Canada, however, defined good faith as acting "without malice." Since the defence of qualified privilege is only effective in a defamation action where the defendant acts without malice, the court relied on the law of libel in interpreting the words "without malice."[72]

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[68] Appellant's Factum to Supreme Court of Canada at 5-6.

[69] *Supra*, note 6 at 76-77.

[70] *Supra*, note 67 at 187-88.

[71] *Supra*, note 1 at 231.

[72] Spence J., *id.* at 232, cited a passage from *Horrocks* v. *Lowe*, [1972] 3 All E.R. 1098 at 1102 where Lord Denning quoted and adopted a paragraph from *Gatley on Libel and Slander*:

> If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was not based on any reasonable grounds; or because he was hasty, credulous, or foolish in jumping to a conclusion, irrational, indiscreet, pig-headed or obstinate in his belief.

Hence the court was prepared to extract from the law of libel a definition to be used with respect to the doctrine of confidence. Yet there would appear to be no reason why the doctrine of qualified privilege could not be asserted as a defence in any action to which the policy and rationale of the defence would be applicable, even though not an action for defamation.

## E. CONCLUSION

Although the doctrine of privilege may have been inappropriately applied in *Slavutych* v. *Baker*, the Court's adoption of Wigmore's test has nevertheless provided future courts with a practical and rational guideline. As noted earlier, Wigmore formulated the test as an explanation of the existing law of privilege and thus implicitly rendered the test inappropriate as a device to create new privileges where the common law previously did not. Yet our courts are free to re-examine the premises upon which the older cases rested and adapt their principles to the "changing needs and conditions of society which is essential to the proper function of the common law."[73] It is not likely that a proliferation of new privileged communications will arise as a result of this decision. Nor would such an occurrence be desirable. When it is absolutely necessary to create a new privilege, however, it is reassuring to know that the judge's hands will not be tied by lack of authority.[74] In fact, in a decision subsequent to *Slavutych* v. *Baker*, the Wigmorian test as sanctioned by the Supreme Court of Canada was considered. In *Strass* v. *Goldsack*, Clement J.A. stated:

> . . . the sanction given to these four conditions as the test for a claim of privilege

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[73] *Strass* v. *Goldsack* (1976), 58 D.L.R. (3d) 397 *per* Clement J.A. at 415.

[74] This decision will probably be lauded by Landreville J. whose *obiter dicta* with respect to the need for a medical privilege is worthy of note:

> Legislative action to bring unequivocal recognition of medical privilege would obviously be the rapid answer. But as statutory enactments normally come into existence after *fait accompli* and accepted, laxity in admitting evidence pertaining to what the laymen [sic] believes is privileged communication, is to be resisted.

*G.* v. *G.*, [1964] 1 O.R. 361 at 366.

In the past some courts have attempted to ameliorate the severity of the common law by exercising their judicial discretion to exclude communications that were otherwise non-privileged. *Supra*, notes 28 and 29. If frank and candid communication in any relationship is to be encouraged, then the public must know in advance that the communication will be privileged and thus protected from disclosure in court. To leave the chance of exclusion to the whims or predilections of any particular trial judge will not achieve that goal. See J. Sopinka, *Comment* (1972), Can. Bar Rev. 111 at 115-16. If public policy demands that the communication be consistently protected, then it is ludicrous to refuse to recognize the communication as privileged.

Indeed, after Martland J.'s *dicta* in *Regina* v. *Wray*, *supra*, note 30, the trial judge's right to exercise his judicial discretion in this manner is questionable. If it is true that the trial judge has no discretion to exclude highly probative evidence, then the courts' ability to establish new exceptions to the rule of admissibility will occasionally circumvent a harsh rule. Furthermore, the creation of new privileges will not preclude the exercise of judicial discretion in appropriate cases if the trial judge in fact has such discretion.

> provides a most useful and helpful rationale which should serve well the general public interest in determining such claims.[75]

The distinction between the evidentiary doctrine of privilege and the equitable-cum-evidentiary doctrine of confidence must be carefully maintained. The trial lawyer should consult Wigmore's test when confronted with a communication made in the context of a confidential relationship. If the public interest in the preservation of that relationship is paramount to the public interest in the administration of justice, then there is a good possibility that a court will recognize the communication as privileged.

Where no special relationship is involved then the doctrine of confidence may be employed as an additional shield in the trial lawyer's arsenal. The doctrine of confidence may be applied as a rule of evidence, but although it renders a communication inadmissible, it does not render it privileged.[76] If the application of this doctrine is restricted to the particular facts of *Slavutych* v. *Baker* then its scope as an evidentiary rule is still very limited and would be framed thus: evidence of a confidential communication made in good faith will be inadmissible in proceedings where the rules of evidence are otherwise applicable if disclosure is sought by that party who pledged that it would remain confidential.

It may be argued that the doctrine of confidence is capable of wider application. The Court did not focus on the relationship nor on the confidentiality but on the breach of confidence by the party seeking disclosure. The Court was unwilling to allow a litigant to benefit from his own impropriety. Hence this decision may be the harbinger of an illegally obtained evidence rule in civil proceedings.

As a compromise, *Slavutych*, viewed in the context of the common law principles enunciated in *Ashburton* v. *Pape*,[77] could suggest that a confidential communication will also be inadmissible when tendered by a litigant who obtained it by illegal or improper means notwithstanding that he was not privy to the confidence.

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[75] *Supra*, note 73 at 415. Of course, even the presence of a rational test does not guarantee that it will be correctly applied. For a criticism of the courts' application of the Wigmorean test in this case, see S. Lederman, *Comment* (1976), 54 Can. Bar Rev. 422.

*Quaere* whether the Supreme Court of Canada would now regard the confidential communications between husband and wife as privileged notwithstanding *Rumping* v. *D.P.P.*, *supra*, note 32. Although Wigmore recognized the marital privilege, he stated that "the first three conditions . . . are clearly present with only the fourth in any doubt." *Supra*, note 20 at § 2286 and § 2332.

[76] Although some communications are labelled privileged when no relation is involved, as for example, the so-called privilege against self-incrimination, these involve separate and distinct principles from those involved in this case. Indeed, the same criticism applies to the label "Crown privilege," of which Lord Reid stated, ". . . the expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word." *Rogers* v. *Secretary of State for the Home Dept.*, [1972] 2 All E.R. 1057 at 1060.

[77] *Supra*, note 31.

The doctrine of confidence should not be used to circumvent the application of the doctrine of privilege. In every case where the law recognizes as privileged the communications between two parties, it will protect that communication not only when the party to the communication threatens to disclose it but also when a third party who is not in possession of the communication, attempts to compel disclosure. The law of evidence will not protect a communication from disclosure in court simply because it was made in confidence. Yet the equitable doctrine of confidence can be applied to prevent a third party from obtaining confidential information when it is desired for some non-judicial reason. The courts must not permit this equitable principle to invade the law of evidence. When a litigant seeks to disclose as evidence a non-privileged albeit confidential communication which is not in his possession or which, if in his possession, was properly obtained, the courts must admit this evidence even though the disclosure will result in breaching the confidence, provided that the party seeking the disclosure was not privy to the confidence and made no pledge that it would remain confidential. To exclude this evidence would effectively confer a privilege on the sole basis that the communication was made in confidence.